UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD FIRST REGION

In the Matter of

UNITED NURSES & ALLIED PROFESSIONALS (Kent Hospital)

and

CASE 1-CB-11135

JEANETTE GEARY, An Individual

BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL IN SUPPORT OF EXCEPTIONS

Respectfully submitted by

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I. STATEMENT OF THE CASE

These exceptions are taken to the decision of Administrative Law Judge Joel P. Biblowitz dated March 30, 2011. The following issues are presented in these exceptions:

- 1.) The ALJ erred in failing to find that Respondent, United Nurses and Allied Professionals (the Union), breached its duty of fair representation when it failed to provide *Beck*¹ objectors with a copy of the independent auditor's letter verifying the Union's expenses set forth in its audit for Fiscal Year (FY) 2009.
- 2.) The ALJ erred procedurally in failing to state the standard he applied in concluding that certain lobbying expenses charged by the Union to the *Beck* objectors were lawful charges and in failing to provide a reasoned explanation of how he determined what this standard was.
- 3.) The ALJ erred substantively when he failed to find that the correct standard with respect to the chargeability of lobbying expenses is that lobbying expenses are only chargeable when they are "oriented toward the ratification or implementation of [the union's] collective-bargaining agreement," *Lehnert v. Ferris Faculty Association*.²
- 4.) The ALJ erred in failing to find certain lobbying expenses at issue in the case properly chargeable to *Beck*.

¹ Communication Workers v. Beck, 487 U.S. 735 (1988)

² 500 U.S. 507, 527 (1991).

II. STATEMENT OF THE ISSUES

- 1. Are *Beck* objectors entitled to be given written verification from an independent auditor of a union's expenses at the pre-challenge stage?
- 2. What is the proper standard for measuring the propriety of charging *Beck* objectors for a union's lobbying expenses?
- 3. Do the lobbying expenses found chargeable by the ALJ satisfy this standard?

III. OVERVIEW

The concept of providing *Beck* objectors with information at the pre-challenge step adequate for the purpose of making an informed decision whether or not to challenge charged expenses should include a requirement of adequate written verification from an independent auditor that the expenses claimed by the union were in fact made.

In the context of public sector employment, the Supreme Court has held that objecting non-members may not be charged for an exclusive representative's lobbying expenses, except when the legislation being lobbied for is directly concerned with the acceptance or implementation of a collective-bargaining agreement. The rule should be the same under the National Labor Relations Act.

IV. FACTS

The Acting General Counsel accepts the facts as found by the Administrative Law Judge.

V. ARGUMENT³

1. The Verification Issue⁴

A union's breakdown of its expenditures in its pre-challenge *Beck* notice must be verified by an audit. *California Saw & Knife Workers.*⁵ In *Television Artists, AFTRA (KGW Radio)*,⁶ the Board clarified the union's obligation in this regard and held that an audit involved more than a mere compilation of expenses by an auditor based solely on information supplied by the union. Rather, the Board found that "audit" is a term of art that describes a service performed by an auditor who undertakes an independent verification of selected transactions and confirms the reliability of the financial information contained in the letter certifying that in the accountant's opinion the financial report is accurate and verifying that the union's claimed expenditures were in fact made. However, the Board noted that "absolute precision is not required." Moreover, the auditor need not pass on the correctness of the union's allocation of expenditures to the chargeable and non-chargeable categories.⁸

³ In this brief "T." will refer to transcript page numbers.

⁴ The ALJ, at ALJD p.4, correctly observed that the Board has yet to rule on the issue of whether at the prechallenge stage *Beck* objectors are entitled to written verification by an independent auditor of the union's expenses. However, he erred in assuming that he lacked power to consider the issue in these circumstances. An administrative law judge is not free to rule in a way contrary to Board precedent, but a matter of first impression, as here, does not implicate this rule. An administrative law judge is in fact obligated to work out and decide the application of established Board precedent to a novel question. *See*, Administrative Procedure Act, 5 U.S.C. §557(b). However, while the Acting General Counsel might therefore be entitled to request that the issue under discussion be remanded to the Judge for his decision on the matter, he hereby waives any such right and only seeks the Board's judgment.

⁵ 320 NLRB 224, 239 (1995).

⁶ 327 NLRB 474, 476 (1999).

⁷ Id. at 477.

⁸ ld.

The Board has not specifically addressed the issue of whether a union must provide the *Beck* objector with information about the audit itself at the pre-challenge stage. However, in *Cummings v. Connell*, the 9th Circuit considered that issue in a case arising in the public sector. In *Cummings*, the union's agency fee notice stated that the financial information had been taken from an independent audit and that a copy of the audit would be provided upon request. The union had argued that failing to provide objectors with the independent auditor's verification letter did not amount to any real deprivation of necessary information because it had informed them that its expenses had been audited and that the audit was available upon request. The Circuit disagreed, concluding that the requirement of adequate notice to objectors entailed an obligation to include with the pre-challenge expense figures "a certification from the independent auditor that the summarized figures [given to the objectors] have indeed been audited and have been correctly reproduced from the auditor's report." 10

While the scope of a union's duty to provide objectors with adequate information at the pre-challenge step is derived in *Cummings* from First Amendment considerations arising out of its public-sector context and in the private-sector context of *California Saw¹¹* from the duty of fair representation, the standard must be the same in both contexts because the purpose of the notice is the same, namely, giving the objectors sufficient information upon which to make an informed decision whether or not to challenge one or more of the charged expenses. What constitutes fair notice involves both substantive and procedural aspects. The essence of the holding in *Cummings* is that while the union in that case had not imposed an absolute barrier

⁹ 316 F.3d 886 (9th Cir. 2003), cert denied 539 U.S. 927 (2003).

¹⁰ Id at 892.

^{11 320} NLRB 226-228.

against objectors obtaining written verification of the expenses claimed, it had created a procedural "hoop" for them to jump through first which has too great a tendency to achieve the same result. Moreover, the burden of requiring the union to supply adequate written verification at the time the financial information is given to the objectors is not a great one. It is submitted that the 9th Circuit's conclusion as to what fairness requires with respect to the verification of a union's expenses is the correct one and should be adopted by the Board.

In the instant case, an independent certified public accountant verified the Union's audit for FY 2009 in writing. The itemization of the Union's expenses for this period given to the *Beck* objectors was extracted from the verified audit by the Union's executive director, Richard Brooks. T. 119-121. However, it is the position of the Acting General Counsel that the auditor's letter verifying the actual audit, as opposed to the figures transcribed by the Union from the audit and given to the objectors, would constitute adequate verification under its duty of fair representation. The failure to provide the auditor's verification letter creates an impermissible uncertainty for the objector as to whether, as a matter of objective fact, the claimed expenses were actually incurred.

2. The Standard for Judging the Chargeability of Lobbying Expenses

Section 8(c)(3)(A) of the Administrative Procedure Act, 5 U.S.C. §557 (c)(3)(A), requires that an administrative law judge's decision contain a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." *Iron Workers Local 111 v. NLRB*. 12 However, the ALJ failed to articulate clearly the standard for determining the chargeability of lobbying expenses which he

^{12 792} F. 2d 241, 247-248 (D.C. Cir. 1986).

derived from the cases he cited; neither did the ALJ explain the application of the standard to the facts at issue.

For the following reasons, the correct standard is that lobbying expenses are only chargeable when they are directed toward the ratification or implementation of a collective bargaining agreement and are therefore germane to collective bargaining contract administration and grievance adjustment.

(i) Existing Federal Court case law supports a finding that the Union's lobbying is, in general, non-chargeable

In *Beck*, the Supreme Court noted that while 'state action' arises from the negotiation and enforcement of a union security clause under the Railway Labor Act, 45 U.S.C. §151, because the RLA pre-empts all state laws banning union security agreements, there is no such preemption under the NLRA, since Section 14(b) of the Act expressly preserves the right of states to outlaw union-security agreements. However, the Court declined to rule whether "the exercise of the rights permitted, though not compelled, by §8(a)(3) involves state action." In *California Saw & Knife Works*; ¹⁴ the Board concluded that union security clauses which arise under Section 8(a)(3) do not involve state action and determined that the validity of charges made to objectors must be measured by the duty of fair representation standard. However, the union security cases which arise under the Railway Labor Act and in the public-sector context, on the one hand, and under the NLRA, on the other, normally have the same outcomes in light of the Supreme Court holdings that: 1) the Congressional intent behind the first proviso to §8(a)(3) and §2, Eleventh of

¹³ 487 U.S. at 761.

¹⁴ 320 NLRB 224, 226-228 (1995).

the RLA is identical, *Beck*; ¹⁵ 2) the intention in question is the prevention of free riders, *Locke v. Karass*; ¹⁶ and, 3) such a purpose justifies the consequential infringement of First Amendment rights. ¹⁷

The lead case on the chargeability of lobbying expenses is Lehnert v Ferris Faculty Association. 18 In Lehnert, the Supreme Court addressed the chargeability of a public-sector union's lobbying and other expenses by a public-sector union. The Court, reversing a Court of Appeals decision, 19 held the lobbying efforts of the union to secure funds for public education in Michigan were not constitutionally chargeable. The Supreme Court noted that the lower court was factually correct in observing that public-sector unions often expend considerable resources securing ratification of negotiated agreements by legislative bodies. Also, public-sector unions also engage in efforts to secure appropriations necessary to implement such agreements. However, the Supreme Court distinguished these situations from lobbying activities to increase educational spending. The Court's plurality opinion found the "First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion."20 Justice Scalia's four member dissent concurred in this result. Justice Scalia advocated a more restrictive test under which objecting employees could be required to pay only those expenses relating to the bargaining obligations of a union, excluding those activities the union chooses to engage in without a legal obligation. Only Justice Marshall found that the lobbying constituted a

^{15 487} U.S. at 461-462.

^{16 129} S.Ct. 798, 803 (2009).

¹⁷ Id.

¹⁸ 500 U.S. 507, 527, 111 S.Ct. 1950 (1991).

¹⁹ 881 F.2d 1388 (6th Cir. 1989).

²⁰ Lehnert at 522.

chargeable expense. Justice Marshall argued that legislative "budgetary decisions may be crucial to the union's ability to secure a particular collective-bargaining agreement."²¹

Summing up, in *Lehnert* the plurality opinion held that, "None of these [lobbying] activities was shown to be oriented toward the ratification or implementation of petitioners' collective-bargaining agreement. We hold that none may be supported through the funds of objecting employees."²² In view of the reasoning of the majority, it appears that 8 members of the Court were in agreement on this point.

In *Miller v Air Line Pilots Association*,²³ in a Railway Labor Act case, the D.C. Circuit Court applied the *Lehnert* case to the chargeability of expenses incurred lobbying government institutions for the purpose of improving employee safety. The union argued that expenses arising from contacting government agencies and Congress setting forth the union's views with regard to appropriate federal regulation of airline safety were "interconnected with those airline safety issues that animate much of its collective-bargaining and therefore they should be regarded as germane to that bargaining." However, the Court observed there were major difficulties with the union's position. These activities involved "political actions" that raise First Amendment considerations. The Court observed:

The union would have us see its lobbying on safety related issues as somehow nonpolitical because all pilots share a common concern with these activities. But we cannot possibly assume that to be true. All pilots are surely interested in airline safety, but it would certainly not be unexpected that pilots would have varying views as to the desirability of government regulation-including those regulations of airlines that pertain to safety....

²¹ Id. at 541.

²²Id. at 527.

²³ 108 F.3d 1415, 1422 (DC Cir. 1997)

That the subject of safety is taken up in collective-bargaining hardly renders the union's government relations expenditures germane. Under that reasoning, union lobbying for increased minimum wage laws or heightened government regulation of pensions would also be germane. Indeed if the union's argument were played out, virtually all of its political activities could be connected to collective-bargaining.

The lobbying at issue in the instant case suffers the same defect. Even assuming that all health care workers share an interest in economically viable health care institutions, it cannot be presumed that all would favor various forms of state intervention to achieve that end. Stating the D.C. Circuit's summary a different way, no rational union would pursue lobbying that did not ultimately serve the Union's institutional purpose of bettering the wages, terms, and conditions of the employees it represents. These are the totality of the lawful range of bargaining compelled under Section 8(d) of the Act. The license to charge such overtly political activity to objecting non-members cannot be that broad.

(ii) The Supreme Court's finding in *Locke v. Karass*²⁴ does not provide a basis for finding lobbying to further the interests of represented employees to constitute a chargeable expense.

The Supreme Court's decision in *Locke* did not modify *Lehnert* with respect to the chargeability of lobbying expenses. First, the *Locke* decision concerned expenditures made by a public-sector union and addressed the question, not of lobbying, but of whether national litigation expenses that did not directly benefit the bargaining unit of the objectors constituted chargeable expenses. The Supreme Court concluded that such expenses were chargeable so long as those expenses would otherwise be chargeable and if the local had a reasonable expectation that, in the manner of an insurance scheme, the contributions of other locals to the national program would be available to support litigation on behalf of the local if and when it occurs.

²⁴ 129 S. Ct. 798 (2009).

Second, in its discussion of otherwise chargeable expenses, the majority opinion in *Locke* noted that the local did not charge for such expenses that were "political, public relations, or lobbying activities." The majority opinion observed that prior precedent made it clear that a union could not charge an objector for "certain activities, such as political or ideological activities (with which the non-members may disagree). But under that precedent, the local may charge non-members for activities more directly related to collective-bargaining." These observations by the majority strongly imply that *Locke* in no way sought to alter *Lehnert*'s limitations on the chargeability of lobbying expenditures.

Nor does *Locke* supply a convincing analogy upon which to argue that some of the Union's lobbying expenses benefit unit employees in the same way that litigation expenses might. First, as noted in *Lehnert*, lobbying is an inherently political activity that raises substantial First Amendment considerations. Chargeable litigation expenses are less inherently political. Lobbying is intended to influence a governmental body to create or modify rights – or actively resist attempts to do so. Litigation, by contrast serves to vindicate good faith claims as to existing rights. Accordingly, there is an insufficient predicate for concluding that the Supreme Court would apply the same standard to the chargeability of lobbying that it applies to litigation. Second, as explained by the D.C. Circuit in *Miller* with regard to lobbying on the subject of employee airline safety, the fact that a union may charge for bargaining with an employer about a subject does not mean that lobbying a legislature about that same subject is also chargeable. In their capacity as citizens, employees have a right to hold "varying views as to the desirability of government regulation." *Miller*, 108 F.3d at 1422. The Acting General Counsel contends that

²⁵ Id. at 799.

²⁶ Id. at 803.

charging objecting non-members for engaging in overtly political activities outside of the narrow *Lehnert* exception violates Section 8(b)(1)(A) of the Act because it violates the union's duty of fair representation to such employees. This result is fully congruent with the rule governing public sector and Railway Labor Act employees, and the proper result under the National Labor Relations Act.

(iii) California Saw & Knife Works²⁷ confirms that Lobbying Expenses in this case are not chargeable

In California Saw,²⁸ the administrative law judge concluded that certain legislative expenses were not chargeable. This holding was not contested by the Machinists Union in its appeal to the Board and thus the chargeability of lobbying expenses was not actually before the Board. However, it appears that the Board assumed lobbying was not a chargeable expense. In discussing an extra-unit litigation issue the Board noted:²⁹

Further, the *Lehnert* plurality opinion explained that its reason for maintaining the unit by unit restriction on litigation expenses was to deter a possible burden on free speech raised by "the important political and expressive nature" of extra unit litigation that made it "akin to lobbying." The kinds of extra unit litigation that we contemplate as being properly chargeable to objectors under a union security clause would not be the kinds of lawsuits that are "akin to lobbying." (Emphasis supplied.)

Thus, the Board in *California Saw* observed that the *Lehnert* plurality had treated lobbying as illustrative of a clear non-chargeable expense. Acting on that understanding of *Lehnert*, the Board, in finding extra unit litigation chargeable, emphasized that this litigation was

²⁷ 320 NLRB 224 (1995).

²⁸ Id. at 239, n. 79.

²⁹ Id. at 238.

not "akin to lobbying." The Board's language indicates that the Board was attempting to conform Board policy to the *Lehnert* decision -- a decision which found lobbying very similar to the lobbying herein to be a non chargeable expense.

In the only case where the Board directly addressed lobbying, *Transport Workers Local* 525 (Johnson Controls World Services),³⁰ the Board held that a union representing both public and private employees could charge for expenses related to "legislative, executive branch and administrative agency representation on legislative and regulatory matters closely related to the negotiation or administration of contracts and working conditions." The Board found that the charges imposed by the union for engaging in discussions with government officials were lawful because they were activities that were germane to collective bargaining and attributable to the objecting non-members own bargaining unit. This case appears to be a case that fits within the type of cases deemed chargeable under the standard set forth in *Lehnert* because of the unique role the federal government played in setting the terms and conditions of employment.

Specifically, *Transport Workers* concerned a situation in which the Air Force and NASA had the effective authority to essentially set aside provisions of the collective-bargaining agreements negotiated by the union. It thus appears that the principles of the *Lehnert* case remain the standard for evaluating the chargeability of lobbying expenses.

3. The Lobbying Expenses found Chargeable by the ALJ do not comply with the Correct Standard

The ALJ found that the Union's lobbying efforts on behalf of the Rhode Island Hospital Accountability Merger Act, the Rhode Island Hospital Payments Act, and the Vermont bill increasing mental health funding were properly chargeable.

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³⁰ 329 NLRB 543,544 (1999)

As the ALJ found, Richard Brooks, the Union's Executive Director, testified that the Union lobbied for the Rhode Island Hospital Payments Act because it was concerned about the potential adverse impact of a merger that was under discussion involving Kent Hospital, the Employer in this case. Brooks indicated that a contemplated merger would result in one company having control of 75 percent of the hospital business in Rhode Island and that this would result in a threat to job opportunities resulting from a consolidation or closure of services of one or more of the facilities. ALJD, pp. 2-3. From this stated rationale, it is clear that the Union's lobbying objectives were not directly tied to negotiation or implementation of the collective-bargaining agreement.

The Union lobbied in support of the Rhode Island Hospital Payment Act, which would have resulted in state funding for two hospitals, Kent and Westerly, where the Union represents employees. However, the ALJ made assumptions regarding the ultimate use of the money by the hospitals that is not established by the facts. For example, at ALJD, p. 3, he indicates that an infusion of \$800,000 to the Kent Hospital "would have amounted to approximately \$1200 per full-time employee." However, even assuming that Kent Hospital was willing to consider using the state funds to increase employee wages, the parties would still need to negotiate to achieve this outcome. In these circumstances, the securing of money for Kent Hospital cannot be regarded as the implementation of a collective bargaining agreement, because there is no direct relationship between obtaining additional state funds for the institutions on the one hand, and the application of such money to the direct benefit of the bargaining unit.

According to the factual findings of the ALJ, at ALJD, p. 3, the Union's existing contract with the Westerly Hospital provided that if the hospital's losses are less than \$500,000 per year, then half of the state money could become part of a pool of money utilized for the distribution of

bonuses for employees. However, apparently this would not be the case if, even with the state funds, Westerly Hospital still lost more than \$500,000. Thus, the bill would not have resulted in an automatic payment to unit employees. Accordingly, it is urged that there does not exist a sufficient nexus between the effect of this legislation and the contractual entitlements of the Westerly Hospital employees represented by the Union for this lobbying effort to be deemed the implementation of a collective bargaining agreement. Moreover, as the D.C. Circuit observed in *Miller*, supra, an objecting non-member might well consider additional state funds an inappropriate way to enhance salaries for bargaining unit employees.

With respect to the Vermont legislation concerning mental health funding, the ALJ made no finding that this proposed legislation specifically earmarked funds for employee personnel costs.³¹ This is significant because a specific earmark for personnel costs was the contractual condition required for reopening the contract. Rather, the ALJ, at ALJD, p. 4, found that "either party can reopen the agreement to negotiate about the distribution of those additional funds."

Apart from this provision, the parties could by mutual agreement reopen the contract. However, the Employer is not required to accede to a Union request to do so. Thus, the lobbying for state funds cannot be characterized as the implementation of an existing contractual provision.

Rather, the lobbying sought an additional pool of revenue that could be the subject of future negotiations. This type of funding is exactly the type of funding deemed non chargeable in the *Lehnert* decision.

³¹ Moreover, such a finding is not possible on this record. The burden of proof is on the Union on the issue of chargeability. *California Saw*, 320 NLRB 224, 242 (1995); *Dameron Hospital Assn.*, 331 NLRB 48, 78 (2000). The Union's witness who testified concerning the Vermont bill concerning increased mental health funding, Director of Collective Bargaining and Organizing John Callaci, made no claim that the bill would have provided for any funding restricted to use for wage and benefits purposes. See, T. 99-103.

4. The Union's Lobbyist Registration Fees

Joint Exhibit 2(c), as the parties stipulated at T. 16-17, was the itemization of the Union's expenses for FY 2009 which was given to the *Beck* objectors. It contains a \$45.00 expense denominated "LOBBYIST" which Brooks testified, at T. 22, represented the fees required for registration as a lobbyist which the Union paid to Vermont and Rhode Island. It is obvious that if any of the legislation which the Union lobbied for in Rhode Island or Vermont in FY 2009 was germane to the Union's collective-bargaining function, these fees would be chargeable in their entirety because registration is a threshold requirement for all lobbying. Thus, if the ALJ's decision were otherwise correct, his failure to find these registration fees non-chargeable would also be correct. But once, as here, it has been demonstrated that no chargeable lobbying occurred in the relevant year, the associated registration fees must also be deemed non-chargeable.

VI. CONCLUSION

The Union's lobbying expenses, including its lobbyist registration fees, at issue in the Acting General Counsel's exceptions were not properly chargeable to the *Beck* objectors in the Kent Hospital bargaining unit and the ALJ's remedy should be revised accordingly.

Respectfully submitted.

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Dated at Boston, Massachusetts this 27th day of April, 2011.

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